

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS: 97-0345
State Withholding Tax
For the Tax Years 1993 and 1995

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Withholding Tax Assessments Made Against Taxpayer as Responsible Officer.

Authority: IC 6-3-4-8; IC 6-3-4-8(f); IC 6-3-4-8(g); IC 6-8.1-5-1(a); IC 6-8.1-5-1(b); IC 6-8.1-5-1(c); Indiana Dept. of Revenue v. Safayan, 654 N.E.2d 270 (Ind. 1995).

Taxpayer challenges the decision by the Department of Revenue (Department) assigning him personal responsibility for the unpaid withholding taxes incurred by bankrupt corporation for which taxpayer served as a corporate officer and in which taxpayer was a shareholder.

STATEMENT OF FACTS

The Department determined that a bankrupt corporation had failed to forward to the state an amount of employee withholding taxes during 1993 and during 1995. Lacking more specific information necessary to determine the exact amount of withholding taxes due, the Department arrived at an assessment of taxes based on the "best information available."

In addition to notifying the bankrupt corporation, the Department determined that taxpayer – as a "responsible officer" and shareholder of the bankrupt corporation – was individually responsible for the unpaid taxes.

In a letter dated May 4, 1997, and received by the Department on May 7, 1997, taxpayer forwarded a letter stating that the primary lien holder had seized all of the bankrupt corporation's assets including all "valid receivables." According to taxpayer, "It is estimated that the receivables has sufficient funds to cover the IRS and [Department]."

In addition, taxpayer forwarded reconstructed financial records which purported to establish that the specific amount of withholding taxes assessed by the Department was excessive. According to taxpayer, it was necessary to reconstruct the 1993 and 1995 payroll records because, "The original Officer Records were impounded by the Primary Lender." Taxpayer stated that, based on the reconstructed records, "there is quite a difference in what appears to be an estimate by the State of Indiana and the Actual payroll that was paid out."

Taxpayer was notified on January 10, 2001, that he was entitled to explain the basis for his protest at an administrative hearing. The Department received taxpayer's response on October 23, 2001, in which he stated it would be impossible to take part in the administrative process until after July 2002. The Department responded on October 24, 2001 encouraging the taxpayer to further explain the basis for his protest by any means available. The Department offered the opportunity for taxpayer to provide the information either in writing or by telephone. Taxpayer failed to respond.

The Department sent a letter to taxpayer dated September 2, 2003. Taxpayer was again invited to explain the basis for his protest. Again, taxpayer failed to respond. This Letter of Findings is based upon taxpayer's initial 1997 letter and on the information accumulated within the protest file.

DISCUSSION

I. Withholding Tax Assessments Made Against Taxpayer as Responsible Officer.

IC 6-3-4-8 imposes upon employers the responsibility for withholding state income taxes and remitting those taxes to the state. Under IC 6-3-4-8(f), the taxes which have been withheld belong to the State of Indiana. The employer is charged with the duty of "hold[ing] the [taxes] in trust for the state of Indiana and for payment thereof to the department in the manner and at the times provided."

The bankrupt corporation was responsible for withholding its employees' income taxes and forwarding those amounts to the state of Indiana. From the language contained in IC 6-3-4-8(f), it is clear that the withheld taxes do not belong to the employer and do not constitute a fungible asset accessible to a company in distress. The withheld taxes are held in "trust for the state of Indiana" Id.

A. Responsible Officer.

If the corporate employer is unwilling or unable to forward the withheld employee taxes, the corporation's officers may be held responsible for taxes. IC 6-3-4-8(g) provides that, that "[I]n the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest."

Pursuant to Indiana Dept. of Revenue v. Safayan, 654 N.E.2d 270, 273 (Ind. 1995), three factors are relevant in determining if taxpayer is a corporate officer who had the authority and responsibility for the payment of taxes held in trust for the state. The court will look to the person's authority within the power structure of the corporation. Where that person is a high-ranking corporate officer within the corporate power structure, that officer is presumed to have had sufficient control over the company's finances to give rise to a duty to remit trust taxes. The presumption may be rebutted by a showing the officer did not in fact have that authority.

Second, the court will look to the authority of the officer as established by the articles of incorporation, bylaws, or employment contract.

Third, the court will consider whether the person actually exercised control over the finances of the business including whether the person controlled the corporate bank account, signed corporate check and tax returns, or determined when and in what order to pay creditors.

In his 1997 protest letter, taxpayer identifies himself as both “secretary” and “shareholder” of the bankrupt corporation. The Department’s records confirm that taxpayer was both an officer of the bankrupt corporation and a designated “responsible officer.” Taxpayer has not provided information explaining his duties within the bankrupt corporation or the degree of authority taxpayer exercised over the bankrupt corporation’s activities. However, it is unrefuted that taxpayer was one of the four officers in the bankrupt corporation and that he owned a share of that business. As the Indiana Supreme Court has stated, “Where that person is a high-ranking corporate officer within the corporate power structure, that officer is presumed to have had sufficient control over the company’s finances to give rise to a duty to remit trust taxes.” Safayan, 654 N.E.2d at 273.

IC 6-8.1-5-1(c) provides in part that, “The notice of proposed assessment is prima facie evidence that the department’s claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made.” Under the court’s holding in Safayan and IC 6-8.1-5-1(c), taxpayer has the burden of demonstrating that the proposed assessment of withholding taxes was incorrect or that he – as a responsible officer – lacked sufficient control over the bankrupt corporation’s finances such that he did not have a duty to assure the bankrupt corporation remitted the unpaid trust taxes.

Taxpayer has provided nothing to refute the presumption that he was a responsible officer of the bankrupt corporation, that he had a duty to assure that the withholding taxes were paid to the state, and that he should not now be held personally responsible for the unpaid taxes.

B. Best Information Available.

The Department determined that the bankrupt corporation had failed to forward withholding taxes due in 1993 and 1995. Because the bankrupt corporation failed to provide any payroll records during those periods, the Department determined the amount of unpaid trust taxes based upon the “best information available.” Taxpayer disagreed with the Department’s determination and supplied information purporting to establish that “there is quite a difference in what appears to be an estimate by the State of Indiana and the Actual payroll that was paid out.”

In plain, straightforward language, IC 6-8.1-5-1(a), authorizes the Department, if it reasonably believes that a taxpayer has not reported the proper amount of tax due, to make a proposed assessment of unpaid tax on the basis of the best information available to the department. Although taxpayer has provided information purporting to refute the Department’s conclusion as to the amount of unremitted trust taxes, the information provided is simply taxpayer’s own bare, unsubstantiated assertion. Taxpayer has provided nothing which specifically refutes the Department’s conclusion or which provides a substantive basis for conclusively determining the bankrupt corporation’s 1993 and 1995 payroll.

The Department's proposed assessment, under IC 6-8.1-5-1(b), is deemed to be "prima facie evidence that the department's claim for the unpaid tax is valid." That same section of the Indiana Code goes on to state that "the burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Taxpayer has failed to meet this burden. He is personally responsible for the unpaid trust taxes.

FINDING

The taxpayer's protest is respectfully denied.

DK/JM/MR – 031809